

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
CRIMINAL DIVISION
HCT-00-CR-CN- 006/2021

Arising out of criminal case No 207/2019

KAYONDO SULAYIMANI:::::::::::::::::::::::::::::::::APPELLANT

VERSUS

UGANDA:::RESPONDENT

BEFORE HON. JUSTICE TADEO ASIIMWE

JUDGMENT

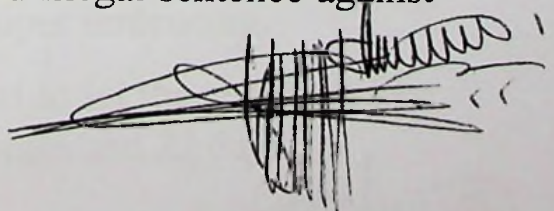
This appeal arises from Judgement and orders of his worship Baligeya Moses Mufumbiro dated 29/12/2020.

The background of this appeal is that the accused person was charged and convicted with the offence of Theft contrary to section 254 and 261 CPA.

He was subsequently sentenced to a refund of UGX 10,000,000/= or to serve 3 years' imprisonment in default.

The appellant being dissatisfied with sentence of the trial magistrate appealed to this court on one ground as follows; -

1. That the learned trial magistrate erred in law and in fact when he imposed a manifestly harsh, excessive and illegal sentence against the appellant.



At the hearing, the appellant was represented by counsel Nsubuga Samuel while the Respondent was represented by Timothy Amerit, a state attorney.

Counsel for the appellant filed written submissions that are on record and the respondent made oral submissions which I shall consider in this appeal.

In his submission, counsel for the appellant submitted that the learned trial magistrate misdirected himself when he decided that the appellant was not remorseful there by imposing a sentence of 3 years which was excessive and harsh.

He further argued relying on the case of **senkungu Lutaya vs Uganda Crim. Appeal no 67 of 2012** that the sentence of 3 years' imprisonment in default of a refund of 10,000,000/= imposed on the appellant by the magistrate is illegal and out of the sentencing ranges provided in the law.

In reply, the learned state Attorney contended that the sentence was appropriate considering that the offence with which the appellant was charged carries a maximum sentence of 10 years. In his view, 3 years cannot be said to be excessive or harsh. He cited the case of **Aharikundira Musitina vs Uganda** arguing that sentencing is a matter of judicial discretion and that the appellate court will only intervene where the sentence exceeds permissible range or variation.

On the issue of illegality of sentence, the state attorney argued that a refund of 10 million is not a sentence in its self and that it would only have come as a consequential order. He therefore conceded that it was an illegal sentence and invited this court to rectify the record by passing an appropriate sentence and that in the alternative, quash the illegal sentence and the file be sent back to the trial court for proper sentencing.

In rejoinder the appellant's counsel invited court to set the appellant free since he has served an illegal sentence for 3 months and 22 days.

RESSOLUTION

This being a first appellate court, the court is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see **Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997 and Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997**, where it was held that: “the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it”.

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see **Pandya v. Republic [1957] EA. 336**) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see **Shantilal M. Ruwala v. R. [1957] EA. 570**). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see **Peters v. Sunday Post [1958] E.A 424**).

In this appeal, the only ground raised by the appellant relates to excessiveness, harshness and illegality of the sentence imposed on the appellant. This court will deal with the issue of illegality of sentence.

I agree with the submission of both counsel that this court has powers to intervene in a situation where a sentence is harsh, manifestly excessive so as to amount to an injustice and or illegal and it is dependent on judicial discretion as per the case of **Aharikundira Yisitina vs Uganda supreme court criminal appeal no. 27 of 2015**.

For any court sentence to be legal it must be founded in the law governing criminal cases.

In this case, the appellant was charged with the offence of theft contrary to section 254 and 261 of the PCA. The maximum sentence for this offence is 10 years.

The appellant was sentence to a refund of UGX 10,000,000/= or 3 years in default. This sentence is not provided for in the PCA. In their submission both parties agreed that indeed the trial Magistrate erred in his sentence.

It would have been different if the refund of money is pronounced as a fine with a default clause of a term of imprisonment and a separate compensation order is passed with in the appropriate laws.

Clearly, the sentence imposed by the trial Magistrate in this appeal is non-existent and cannot be said to be a legal one.

In conclusion, the sentence is found illegal. It here by quashed and substituted with a sentence of a caution in view of the fact that the appellant has served an illegal sentence for 4 months.

I have noted that as a consequence of the offence committed by the appellant, the complainants have suffered material loss at the hands of the appellant. To remedy the said loss, I will exercise my discretion and order the appellant in addition to pay compensation of UGX 10,000,000/= to the complainants in accordance to section 197 of the magistrate's court Act.



TADEO ASIIMWE

JUDGE-04/05/2021